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IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR AN ORDER OF PROHIBITION BY DATUK YONG TECK LEE & 4 ORS.

HIGH COURT SABAH & SARAWAK, KOTA KINABALU
DATO' SULEIMAN BIN HASHIM J.
[ORIGINATING MOTION NO.K. 25-12 OF 1994]
b 14 NOVEMBER 1994

CRIMINAL AND PROCEDURE*: Illegal procession - On previous occasions no prosecution - Whether legitimate expectation created - Circumstances when legitimate expectation applicable.*

c The five defendants in this case were charged in respect of processions held in respect of the Parliamentary General Elections in the State of Sabah on 20 and 21 October 1990. The police authorities did not on the occasion of the 1990 Parliamentary Elections make any statement in Sabah that processions would be prohibited on nomination day. Neither was any statement made that any persons found participating in any such electoral procession would be presented. The defendants contended that in not issuing any such warning or statement and in view of what has
d been practised or allowed to take place on nomination day for over the past many years in Sabah, the prosecuting authorities had created a legitimate expectation in the public that persons participating in processions accompanying candidates to nomination centres on nomination day would not be prosecuted for so doing.

Held:

[1] Before one can lay claim to "legitimate expectation" one must in the first place as a pre-requisite
e have acquired a status, have been put into a position, conferred or put into either expressly or impliedly by an authority or by a person in authority or by way of representation either expressly or impliedly by an authority or by a person in authority that there could be no prosecution together with that express representation being put into practice "thus a regular practice which the claimant can reasonably expect to continue", thus the police could not go back on the promise or practice so as to defeat the claimants' expectation.

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[2] in the present case in the case of defendants no. 1 to no. 5, the Malaysian police had not put into practice anything, anything at all, as did the Hong Kong Police in *Li Wing Tat* that the Hong Kong Supreme Court could say "a regular practice which the claimant can reasonably expect to continue", thus the Hong Kong police could not go back on the promise or the practice so as to defeat the claimant's expectation.

g *[Defendants application dismissed with costs]*

Cases referred to:
Karpal Singh & Anor vs P.P [1991] 2 MLJ SC ***(refd)***
Berthelsen (J.P) v Director General of Immigration Malaysia & Ors [1987] 1 MLJ 134 ***(dist)***
Li Wing Tat (Hong Kong Supreme Court) unreported ***(dist)***

h **Legislations referred to:**
Rules of the High Court 1980, O. 53 r. l
Courts of Judicature Act 1964, s. 35

For the applicants - C.A. Skinner; Ho Ken Kong; Lawerence Chong & James Tsai
For the public prosecutor - Azahar bin Mohamed, SFC

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JUDGMENT

Suleiman bin Hasim J:

This is a second time this matter is before me, this time by way of an application for leave, O.53, r.1, Rules of the High Court 1980 and under s. 35 Courts of Judicature Act, 1964.

These are five summons cases:

(1) Kota Kinabalu Magistrates' Court summons case no. 348/90, *P.P. vs. Datuk Yong Tech Lee*, the charge:

> **First Charge:**
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> That you on 11 October 1990 between 9.40 a.m. to 12.35 p.m near Bangunan Great Eastern Life, Jalan Gaya, in the District at Kota Kinabalu, in the State of Sabah, whilst participating in a procession in respect of which no licence has been issued, did disobey an order to disperse by the officer-in-charge of the police district Kota Kinabalu, and that you have thereby committed an offence under s. 27(4) and punishable under s. 27(8) of the Police Act no. 41 of 1967.
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> **Second Charge:**
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> That you on 11 October 1990 about 12.35 p.m. near Bangunan Great Eastern Life, Jalan Gaya, in the District of Kota Kinabalu, in the State of Sabah, did participate in a procession in a public place without a licence from the officer-in charge of the police district Kota Kinabalu, in which police district such procession was convened, and that you have thereby committed an offence under s. 27(5)(a) and punishable under s. 27(8) of the Police Act no.41 of 1967.

(2) Kota Kinabalu Magistrates' Court Summons case no. 349/90, *P.P. vs. Yong Chiew Lip @ Philip Yong*, the charge:

> That you on 11 October 1990 about 12.35 p.m. near Bangunan Great Eastern Life, Jalan Gaya, in the District of Kota Kinabalu, in the State of Sabah, did participate in a procession in a public place without a licence from the officer-in-charge of the police district Kota Kinabalu, in which police district such procession was convened, and that you have thereby committed an offence under s. 27(5)(a) and punishable under s. 27(8) of the Police Act no.41 of 1967.

(3) Kota Kinabalu Magistrates' Court Summons case no. 350/90, *P.P. vs. Awang Lamin bin Deramin @ Ste*, the charge:

> That you on 11 October 1990 about 12.35 p.m. near Bangunan Great Eastern Life, Jalan Gaya, in the District of Kota Kinabalu, in the State of Sabah, did participate in a procession in a public place without a licence from the officer-in-charge of the police district Kota Kinabalu, in which police district such procession was convened, and that you have thereby committed an offence under s. 27(5)(a) and punishable under s. 27(8) of the Police Act no.41 of 1967.

(4) Kota Kinabalu Magistrates; Court summons case no. 351/90, *P.P. vs. Wong Kui Sing @ Peter Wong*, the charge:

> That you on 11 October 1990 about 12.35 p.m. near Bangunan Great Eastern Life, Jalan Gaya, in the District of Kota Kinabalu, in the State of Sabah, did participate in a procession in a public place without a licence from the officer-in-charge of the police district Kota Kinabalu, in which police district such procession was convened, and that you have thereby committed an offence under s. 27(5)(a) and punishable under s. 27(8) of the Police Act no.41 of 1967.

(5) Kota Kinabalu Magistrates' Court summons case no.352/90, *P.P. vs. Akmat bin Umal Basah*, the charge:

That you on 11October 1990 about 12.35 p.m. near Bangunan Great Eastern Life, Jalan Gaya, in the District of Kota Kinabalu, in the State of Sabah, did participate in a procession in a public place without a licence from the officer-in-charge of the police district Kota Kinabalu, in which police district such procession was convened, and that you have thereby committed an offence under s. 27(5)(a) and punishable under s. 27(8) of the Police Act no.41 of 1967.

I shall refer to the five defendants in the five cases as defendants no.1 to no.5 respectively.

The five cases were to be a joint trial. The trial, however, never got started in the Magistrates' Court.

The record of proceedings in the Magistrates' Court at some places is lacking in lucidity, lacking in clarity. From what I can make out, subject to correction, the chronology of events in the Magistrates' Court included:

(1) In case no.1 according to the note on the charge sheet and the record of proceedings in the Magistrates' Court defendant no.1 was charged in Court, the charges read, explained, and defendant no.1 claimed trial, on 21 December 1990.

(2) In case no.2 there is no note on the charge sheet but according to the record of proceedings in the Magistrates' Court, defendant no.2 was in Court on 2 April 1991.

(3) In case no.3 to no.5 according to the note on the charge sheets and the record of proceedings in the Magistrates' Court, defendants no.3 to no.5 were in Court on 2 April 1991. Defendant no.1 was also in Court on 2 April 1991.

(4) All five defendants were in Court at subsequent sittings of the Court. There is, however, no record that the charges were read, explained to defendants no.2 to no.5, and/or their pleas taken.

(5) On 9 December 1991 it was realised that a Counsel from West Malaysia, who on 2 April 1991 was one of two Counsels for defendant no.2 and who on 2 September 1991 was also one of two Counsels for defendant no.3 was without a work permit.

(6) On 10 December 1991 Counsel for defendants no.1 and no.2 informed the Court that defendants no.1 and no.2 would be making an application for a transfer, presumably of the cases against defendants no.1 and no.2, to the High Court under s s. 417, 418 Criminal Procedure Code (FMS Cap.6) which application, however, was not pursued.

(7) On 11 May 1992 Counsel for defendants no.1 and no.3 informed the Court that an application had been filed in the High Court "seeking a declaration in respect of the charges." This was the Originating Summons no. K46/1992 High Court Kota Kinabalu dated 8 May 1992 by defendant no.1 seeking:

1. A declaration that s. 27(8) of the Police Act, 1967 (revised 1988) is ultra vires the Federal Constitution of Malaysia in that it contravenes Article 8(1) and Article 10(1) of the Federal Constitution of Malaysia and to that effect are null and void under Article 4(1) of the Federal Constitution of Malaysia as the above stated section discriminates unfairly against such persons as the plaintiff and does not afford him equality under the law.

2. A declaration that ss. 27(2) and 27(5) of the Police Act, 1967 (Revised 1988) are ultra vires the Federal Constitution of Malaysia in that they contravene Article 10(1)(b) of the Federal Constitution of Malaysia and to that effect are null and void under Article 4(1) of the Federal Constitution of Malaysia as the above stated sections are prohibitive and not restrictive in nature.

3. Further or other relief which this Honourable Court deems fit.

4. Costs.

On 15 September 1992 His Lordship Dato' Syed Ahmad Idid heard and dismissed the originating summons.

And in the Magistrates' Court the continuation of the chronology of events included:

(1) On 26 October 1992 Mr. C. Skinner, Counsel for defendants no.1 and no.3, informed the Court "we are not decided yet whether to appeal to the Supreme Court". There was no appeal.

(2) On 19 July 1993 Mr. C. Skinner, Counsel for defendants no.1 and no.3, informed the Court that defendant no.1 was making an application to the Court, "my learned friends also wish to join in the application" that the Court "decline to accept jurisdiction to try the two charges on the ground that the bringing of these 2 charges against me is an abuse of the process of this Court wherefore this Honourable Court should decline to hear this case against me". Defendant no.1 filed an affidavit affirmed on 13 July 1993, the grounds being:

(a) There has been up till now no prosecutions brought against any person under s. 27(3) and s. 27(5)(a) of the Police Act 1967 (revised 1988) for having disobeyed a police officer's order to disperse or for having participated in a procession without a licence where the purpose or occasion for such procession is to file nomination papers during an electoral process.

(b) That in not having brought any such prosecution in the circumstances described above, the Government of Malaysia has created a legitimate expectation in the public that where an electrol process is in progress persons allegedly participating in a procession would not be prosecuted under the Police Act or other relevant law unless the authorities have made a prior announcement to the effect that electoral processions were disallowed or issued some other equally clear warning to the public that to do so would entail their being prosecuted. Even on occasions where such warnings have been issued and gone unheeded, the authorities have not brought any prosecutions.

Mr. C. Skinner and Encik Gani Patail, Senior Federal Counsel, made submissions on the application. The latter reiterated that:

...this Application to-day cannot be entertained in the Subordinate Court. The Subordinate Court does not have inherent jurisdiction based on the argument that there is an abuse of the process of the Court, i.e. to decline to hear the case.

Encik Gani Patail also reiterated that "there is no abuse of the process of the Court" in the charges against the five defendants.

On 20 July 1993 the Magistrate ruled:

(1) As to issue (1) raised by the learned SFC that this application cannot be entertained in the Subordinate Court this Court ruled that this Court has the jurisdiction to hear the accused's application.

(2) As to issue (2) that the Court does not have the inherent powers to decline to hear this case this Court is of the opinion that it has no inherent powers to decline to accept jurisdiction to try the case against the accused.

Court:

Court now order that the trial proper to proceed.

On 21 July 1993 the DPP filed notice of appeal against the Order of the Magistrate that "the Magistrate Court has jurisdiction to hear an application by the respondents for the Court to decline jurisdiction on the ground of an abuse of the process of the Court."

On 23 July 1993 defendant no.1 filed notice of appeal against the order of the Magistrate that "the Magistrates' Court has no inherent power of jurisdiction in criminal cases to decline to accept jurisdiction to try the above-mentioned charges even where grounds were raised by the appellants that to hear the charges preferred against the appellants in the particular circumstances of the case would amount to an abuse of the Court's process."

On 26 September the appeals were before me.

On 26 September both Mr. C. Skinner on behalf of defendant no.1 and the DPP withdrew their appeals. Mr. C. Skinner added that defendant no.1 was withdrawing the appeal to make way for, to facilitate, the present application before me.

Perhaps it would not be too disconcerting to see what happened in the application by defendant no.1 in the Magistrates' Court.

In the Magistrates' Court Mr. C. Skinner relied I think to some considerable extent on *Karpal Singh & Anor. v. PP* [1991] 2 MLJ SC where Mr. Karpal Singh, the first applicant and another, were charged in the Magistrates' Court with separate offences under s. 27(5)(a) punishable under s. 27(8) of the Police Act 1967, charges similar with the charges in the present five cases, and where "at the hearing before the Magistrate the applicants raised a preliminary objection contending that the proceedings against them amounted to oppression and in all the circumstances of the case the prosecution was oppressive and repugnant to the good administration of justice and the Court has a general and inherent power to protect its process from abuse and that power must include a power to safeguard an accused person from oppression or prejudice and that accordingly the Court had the power to strike out proceedings." *Karpal Singh's* case a Supreme Court, as it then was, judgment is binding on me.

The application in the Magistrates' Court by defendant no.1 was that the Court "decline to accept jurisdiction to try the 2 charges on the ground that the bringing of these 2 charges against me is an abuse of the process of this Court wherefore this Honourable Court should decline to hear this case against me", not to "strike out proceedings" as in *Karpal Singh's* case.

In *Karpal Singh's* case a judgment of the Supreme Court, as it then was, on reference under s. 66 of the Courts of Judicature Act 1964, His Lordship Tun Dato' Seri Abdul Hamid Omar, LP, as he then was, explained for our guidance the matter of such applications on grounds of "abuse of process of Court". His Lordship explained for our guidance the position of the Attorney-General, more particularly *vis-a-vis* the conduct of criminal prosecutions, i.e., more particularly Article 145(3) of the Federal Constitution and the relevant provisions of ss. 5, 173 and 376 of the Criminal Procedure Code (FMS Cap. 6).

In *Karpal Singh's* case His Lordship also said:

> There is no provision in the Code for striking out proceedings or acquittal without hearing all evidence the prosecution has the capacity to offer, even though postponements are needed. If any party feels that the charge and consequent proceedings are illegal on the face of the record, which we feel is rare, his remedy is to take up appropriate proceedings before a High Court to quash the charge and the whole proceedings producing evidence to the satisfaction of the trial Judge to adopt such a case. It is absurd and against common sense to believe that the legislature ever expected members of subordinate judiciary to exercise such vast powers, trespassing into the public prosecutor's area.

As His Lordship pointed out "there is no provision in the Code for a Magistrate to strike out proceedings..."

Similarly there is no provision in the Code for a Magistrate "to decline to accept jurisdiction..."

Defendant no.1 was not complaining "the charge and subsequent proceedings are illegal on the face of the record."

Defendant no.1 was not complaining of delay, a matter also dealt with in *Karpal Singh's* case.

Now Mr. C. Skinner has come back to me for defendant no.1, assisted by the other Counsels for the other defendants, no doubt feeling fortified by what Tun Lord President said in *Karpal Singh's* case and buttressed by the cases *J.P. Berthelsen* [1987]1 MLJ 134 SC and *Li WingTat,* Hong Kong Supreme Court "Magistracy Appeal No. 1286/90" unreported. Mr. C. Skinner tendered a copy of the judgment.

Mr. C. Skinner submitted on other cases as well. The Senior Federal Counsel submitted on other cases as well and replied on the three above cases.

In *Karpal Singh's* case Tun Lord President did say "if any party feels that the charge and consequent proceedings are illegal on the face of the record, which we feel is rare... doctrine of inherent jurisdiction... a High Court may invoke such prerogative powers in rare instances where it is right to do justice to the accused.... In the case of obvious abuses or other forms of material defects, it cannot be said the High Court does not possess the powers to do right and to undo wrong in the course of administration." Tun Lord President also said:

> In matters like criminal law of a purely domestic nature, our view is that the Court will only exercise its inherent powers when there is miscarriage of justice. The Court must be careful that the decision is not in conflict with the intention of the legislature as indicated in statutory powers. The inherent power apparently cannot be invoked to override an express provision of law or when there is another remedy available. Where the legislature has provided a particular mode of action or has vested an authority with powers to act in a particular manner and has prescribed the conditions limiting the scope of such action, the Court cannot act outside those powers and conditions.

Thus the door is open but not the flood-gates. Admission or admittance is select, only after careful and if I may say so, judicious examination, scrutiny, limited to and within the scope stated by Tun Lord President.

Defendant no.1 says that "the grounds upon which the four other applicants and I maintain that to allow the Summonses to be heard would amount to an abuse of process are as follows:"

> (a) There has been up till now no prosecutions brought against any person under s. 27(3) and s. 27(5)(a) of the Police Act 1967 (revised - 1988) for having disobeyed a police officer's order to disperse or for having participated in a procession without a licence where the purpose or occasion for such procession is to file nomination papers during an electoral process.
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> (b) That in not having brought any such prosecution in the circumstances described above, the prosecuting authorities have created a legitimate expectation in the public that where an electoral process is in progress persons allegedly participating in a procession would not be prosecuted under the Police Act or other relevant law unless the authorities have made a prior announcement to the effect that electoral processions were disallowed or issued some other equally clear warning to the public that to do so would entail their being prosecuted. Even on occasions where such warnings have been issued and gone unheeded, the authorities have not brought any prosecutions.

Defendant no.1 then went on to trace the history with details of elections and by-elections held in the State of Sabah since 1976. According to defendant no.1 for the 1986 Sabah State Legislative Assembly General Elections the Police had expressly prohibited processions and no processions were held. For other elections and by-elections the Police had not expressely prohibited processions and processions were held. In all cases there has been no prosecution by the Police. Defendant no.1 said:

> To the best of my knowledge on practically every nomination day in respect of the above mentioned Sabah State Legislative Assembly elections the usual practice described above by me took place, except for nomination day in respect of the 1986 Sabah State Legislative Assembly General Elections. The reason why no processions took place on nomination day in respect of the 1986 Sabah State Legislative Assembly General Election was because after

the 1985 State Legislative Assembly General Elections, violent riots broke out. The police authorities therefore made public announcements and warnings that processions and assemblies would not be permitted.....

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(v) With regard to the State General Elections held in 1986 and why no processions took place on nomination day I wish to say that in 1985 Sabah State Legislative General Elections were held and the election was keenly contested. Following the result of the 1985 Sabah State General Elections unrest occurred which led to violent riots breaking out in early 1986 resulting in loss to property. As a result of such riots, many persons taking part in the riots were charged and subsequently convicted. It is pertinent to note here that the charges brought against the abovementioned persons did not relate to the occasion of filing of nomination papers for an election.

(vi) In 1986, when Sabah State Legislative Assembly, General Elections were called again, in view of the disturbances that followed the 1985 Sabah State General Elections, the Police authorities made it very clear by way of public announcements to all parties and persons concerned and interested in the nomination day process that no public processions or gathering would be allowed. In so doing, I believe that the Police authorities were making it plain and clear that anybody disobeying such warnings would face prosecution as a consequence. It is now shown to me annexed hereto marked "YTL-8(a) and (b)" newspaper reports of such warnings issued by the Police. I verily believe that as a result of such announcement made by the police, no processions occurred during nomination day for the 1986 Sabah State Legislative Assembly General Elections.

(vii) In 1986 a Parliamentary General Election was also held in Sabah. These elections were held in August 1986, just a few months after the Sabah State General Elections in 1986. In view of the situation then prevailing I believe no processions took place.

6. In respect of the 5 Summons cases now pending before the Magistrates' Court, I now wish to say that:

(i) On or about the 20 and 21October 1990 a Parliamentary General Election was held in the whole of Malaysia.

(ii) Preceding the above date, the Election Commission on the 6th day of October 1990 issued an Election Writ and the effect of this was that as from the 6th day of October 1990 the election process had commenced. It is now shown to me marked "YTL-9" a copy of the abovementioned Election Writ.

(iii) Nomination day for candidates wishing to stand or offer themselves for election to the Parliamentary Constituency of Gaya P 144 was fixed for 11 October 1990 and the Nomination Centre for the Gaya Constituency was the Kota Kinabalu Community Centre.

(iv) The Gaya Parliamentary Constituency is made up of 2 Sabah State Legislative Assembly constituencies namely, N 28 Likas and N 29 Api Api. I was then and am presently the Sabah State Legislative Assembly man for Likas and was therefore directly interested in the electoral and nomination process.

(v) In October 1990, Parliamentary General Elections were called for the whole country, including Sabah. On nomination day, several political parties including USNO, PBS, DAP, BERJAYA and several other parties put up candidates for election on nomination day. I am personally aware that several processions took place throughout Sabah. I wish to refer to exhibit "YTL-6" herein in respect of the aforementioned nomination day.

(vi) The police authorities did not on the occasion of the 1990 Parliamentary Elections make any statement in Sabah that processions would be prohibited on nomination day. Neither was any statement made that any person found participating in any such electoral procession would be prosecuted. In not issuing any such warning or statement and in view of what has been practised or allowed to take place on nomination day for over the past many years in Sabah, I verily believe the prosecuting authorities had created a legitimate expectation in the public that persons participating in processions accompanying candidates to nomination centers on nomination day would not be prosecuted for so doing.

7. I wish to state that in July of 1990 a Sabah State Legislative Assembly General Election was also held. Prior to nomination day in respect of this State General Elections, the police issued a warning to the public that nomination day processions would not be allowed. Despite such a warning, the usual practice of supporters accompanying party candidates to nomination centre did take place. It is now shown to me annexed hereto marked "YTL-10" a newspaper report of the warning issued by the Police. I wish to refer to exhibits at "YTL-5" in respect of newspaper reports of the processions that took place on nomination day. I verily believe that no person has been prosecuted in respect of participating in such processions.

8. After the 1990 Parliamentary General Elections, a Sabah State By-Election was held in 1991 in respect of the Usukan Constituency. The nomination day for such election was fixed for the 30th April 1991 and the nomination centre was the Kota Belud Community Centre. On nomination day two political parties in Sabah, namely the UMNO-Baru and Party Bersatu Sabah, fielded candidates. In accordance with past practice, the candidates were accompanied by party supporters bearing flags to the nomination centre. I believe the respective party supporters did participate in the processions accompanying their party candidate to the nomination centre in Kota Belud. It is now shown to me annexed hereto marked "YTL-11 (a)(b) (c)(d) and (e)" newspaper reports on the nomination day and party supporters accompanying the candidates. No one has been prosecuted or charged in respect of the processions that took place on the aforementioned nomination date despite a police report having been lodged in respect of the procession accompanying the PBS candidate.

The charges against defendants no.1 to no.5 are in respect of processions held in respect of the Parliamentary General Elections in the State of Sabah on 20 and 21 October 1990 and the thrust of defendants' contention now in their claim for "legitimate expectation" is as stated by defendant no.1 in his paragraph 6 (iv) above.

Mr. C. Skinner and the Senior Federal Counsel cited a number of authorities but I think I need only, I would be on safe ground, to use for my guidance only the cases *Berthelsen* and *Li Wing Tat.*

In *Berthelsen's* case the explanatory head-note and in the judgment reads:

In this case the appellant a citizen of the United States of America had been granted an employment pass on 2 November 1986, for the purposes of his employment as a staff correspondent of the Asian Wall Street Journal. On September 20, 1986 he was served with a notice of cancellation forthwith of the employment pass by the first respondent under regulation 19 of the Immigration Regulations, 1963. The notice of cancellation of the employment pass recited that the first respondent was satisfied that the appellant had contravened or failed to comply with the Immigration Act and the Regulations, that he had failed to comply with the conditions imposed in respect of the pass or the instructions endorsed thereon and his presence in the Federation was or would be prejudicial to the security of the country. The appellant applied to the High Court for leave to apply for an order of certiorari to quash the cancellation of the employment pass and for an order of prohibition against his removal from the country but leave was refused. He appealed.

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(2) in this case as the appellant was not afforded an opportunity to be heard before the cancellation of his employment pass, certiorari must go to quash the said cancellation.

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By way of illustration he contrasts the case of an alien whose residence permit has expired with that of another whose permit is revoked before its expiry date; the latter possesses a legitimate expectation of being allowed to stay for the full term of the permit, and he alone has, in consequence, a legal right, in accordance with the principles of natural justice, to insist that his representations be considered before the making of any decision upon his deportation.

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Third, there is an intermediate category, which he termed the expectation cases, which differ from the application cases only in that the applicant has some legitimate expectation from what has already happened that his application will be granted. This head includes cases where an existing licence-holder applies for a renewal of his licence, or a person already elected or appointed to some position seeks confirmation from some confirming authority.

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The doctrine of legitimate expectation has recently been lucidly expounded and explained by the Privy Council in *Attorney-General of Hong Kong v. Ng Yuen Shiu* (6) and Lord Fraser of Tully-belton in delivering the judgment of the Board said (at page 636):

> Accordingly 'legitimate expectations' in this context are capable of including expectations which go beyond enforceable legal rights, provided they have some reasonable basis: see *Reg v. Criminal Injuries Compesantion Board, exparte Lain* [1967] 2 QB 864. So it was held in *Reg v. Board of Visitors of Hull Prison, exparte St. Germain (No. 2)*) [1967] 1 WLR 1041 that a prisoner is entitled to challenge, by judicial review, a decision by a prison board of visitors, awarding him loss of remission of sentence, although he has no legal right to remission, but only a reasonable expectation of receiving it.

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In *Andrew* the detainee was an alien who had unlawfully entered the country in breach of the immigration laws and was no less than an illegal immigrant - a designation much in vogue these days to connote a pesky and pernicious epiphenomenon of transnational beachcombing. He had no right to be here and the order of detention was made against him consequent to an order of removal from the Federation in the first instance in accordance with the relevant statutory provisions. He certainly did not have any right in those circumstances to be entitled to a hearing before the order of detention to the contrary would on a ***reductio ad absurdum*** result in every criminal being entitled to be heard before he can be arrested.

The position in the present appeal is wholly different: the appellant was lawfully in the country under the sanction of an employment pass validly issued for a stipulated period, and he clearly had a legitimate expectation to be entitled to remain in this country at least until the expiry of the prescribed duration, and any action to curtail that expectation would in law attract the application of the rules of natural justice requiring that he be given an opportunity of making whatever representations he thought necessary in the circumstances. The two situations are poles apart, and the suggestion of the relevance of *Andrew* to the matter before us only serves to illustrate the inherent perils blind reference to authority enshrouds when resorted to without a proper appreciation of the vital

considerations involved in the decision in question. The principles enunciated in *Durayappah* which we have adverted to make the position plain.

In *Li Wing Tat's* case "an appeal against both conviction and sentence on informations laid under s. 4(17) and (29) of the Summary Ordinance, Cap.223" judgment of the Hong Kong Supreme Court, the appeal was among other things "(11) Abuse of the Court's process by reason of the police having refrained from prosecuting under either sub-section (17) or sub-section (29) for a long period of time." The judgment of the Hong Kong Supreme Court under the sub-heading "Abuse of Court's process" among other things is:

> The first argument under this head is that the Hong Kong Government on three separate occasions made representations that the use of loudhailers in Hong Kong was not banned.
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> It is said the first representation was made when the Government accepted that s. 4(29) contavened or might contravene the draft bill of rights and consideration was given to its repeal. Even if there was such an indicating from the government, it cannot in my view amount to an undertaking that contravention of an existing and valid sub-section is to be disregarded.
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> The second representation, it is submitted, is in the form of a statement of Her Majesty's Government in its third periodic report on behalf of the Hong Kong Government to the United Nations Committee on Human Rights pursuant to paragraph 40 of the International Covenant on Civil and Political Rights. In that Report it is expressly stated that 'general guidelines under which use of amplification equipment, other than hand-held loudhailers, might be banned', thereby making clear representation that the use of loudhailers in Hong Kong would not be banned. There again, if there is a representation at all, it is not a representation that an existing law is not to be enforced.
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> The third representation relates to what police officers said. According to D2's evidence, a Chief Inspector in 1988 had told him the police would warn him but not prosecute. D5's evidence is that D2 had told him formal warnings would be given by the police but there would be no prosecution. During the sit-in in February last year the participants had been warned in a very casual and friendly manner and the police officer who gave the warning said it was given as a matter of formality. What the police officer said could not by itself amount to a representation of no prosecution. I shall consider this aspect of the question of representation together with the second limb of Counsel's submission on abuse of process that the practice of no prosecution over a long period of time gives rise to a legitimate expectation that the use of hand loudhailers and collection of money in public would not attract prosecution.
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> The only conclusion to be drawn from the evidence is that for well over a decade the police often issued warnings against the use of loudhailers and collection of money without permit but never actually prosecuted any person. Often the warnings were given as a formality or routine, which can only mean to those warned that it would not be followed by a prosecution even if the warning was not heeded. In those circumstances, a practice has been established whereby breaches and continued breaches of the law would not encounter anything worse than a warning. The appellants, and any one who takes part in demonstrations may therefore be forgiven for arriving at the conclusion that warnings will not be followed by prosecution even if the warnings were ignored.
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> The question which now has to be considered is whether the prosecution in the present case amounts to an abuse of the Court's process.
>
> Lord Fraser, in *C.C.S.U. v. Minister for Civil Service* [1985] 1 AC 372 said (at p.401B) that a legitimate, or reasonable, expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue. In such a situation the Courts may well find the public authority guilty of abuse of process

a if it chose to go back on the promise or practice so as to defeat the claimant's expectation. It seems that the rationale behind this proposition is one of fairness. However, it is for the executive and not the Courts to decide whether, in any particular case, the requirements of national security outweigh those of fairness (see pp. 403D, 406G, 407G, 412H- 413B, 120D, 423D- 424 D).

Thus I think before one can lay claim to "legitimate expectation" one must have acquired a status, one must have been put into a position, in *Berthelsen* the status of, the position of, expectation b to stay in the country until 2 November 1986, the representation being the employment pass *per se*, which speaks for itself, which stated so, in *Li Wing Tat* the status of, the position of, expectation of immunity from prosecution akin to the immunity, the privilege accorded to certain categories of the members of the Diplomatic Corps in Malaysia, not to all categories of members of the Diplomatic Corps, the representation being the representation by the Hong Kong police for well over a decade that there would be no prosecution together with for well over a decade the police often issued c warnings against the use of loudhailers and collection of money without permit but never actually prosecuted any person, often the warnings were given as a formality of routine "which can only mean to those warned that it would not be followed by a prosecution, in those circumstances a practice has been established whereby breaches and continued breaches of the law would not encounter anything worse than a warning, thus the existence of a regular practice which the claimant can reasonably expect to continue and in such a situation the Courts may well find the public d authority guily of abuse of process if it chose to go back on the promise or practice so as to defeat the claimant's expectation."

Thus I think before one can lay claim to "legitimate expectation" one must in the first place as a pre-requisite have acquired a status, have been put into a position, conferred or put into either expressly or impliedly by an authority or by a person in authority or by way of representation either expressly e or impliedly by an authority or by a person in authority, in *Berthelsen* the status of, the position of, being able to continue to stay in the country until 2 November 1986, a status, a position, acquired, conferred, or put into expressly by the employment pass *per se*, which speaks for itself, which stated so, in *Li Wing Tat's* case the status of, the position of, immunity from prosecution akin to the immunity, the privilege accorded to certain categories of members of the Diplomatic Corps in Malaysia, not to all categories of members of the Diplomatic Corps, a status, a position, acquired, f conferred, or put into expressly by the representation by the Hong Kong Police for well over a decade that there would be no prosecution together with that express representation being put into practice "thus a regular practice which the claimant can reasonably expect to continue," thus "the Police could not go back on the promise or practice so as to defeat the claimant's expectation."

Not so in the present case in the case of defendants no.1 to no.5.

g In the present case in the case of defendants no.1 to no.5 it is common ground, it is not in dispute, that the Malaysian Police had not, as I had it confirmed from both Mr. C Skinner and the Senior Federal Counsel, the Malaysia Police had not made any representation that there would not be a prosecution.

According to defendant no.1 for the 1986 Sabah State Legislative Assembly General Elections the Police has expressly prohibited processions but surely because the Police had not similarly h expressly prohibited processions in respect of the Parliamentary General Elections in the State of Sabah on 20 and 21 October 1990 it cannot be licence for defendants no.1 to no.5 to commit breaches of the law as alleged in the charges. In *Li Wing Tat* it was for well over a decade the representation of no prosecution by the Hong Kong Police together with that representation being put into practice, the two together was for well over a decade.

i In the present case in the case of defendants no.1 to no.5 the Malaysian police had not promised anything, had not put into practice anything, anything at all, as did the Hong Kong police in *Li*

Wing Tat that the Hong Kong Supreme Court could say "a regular practice which the claimant can reasonably expect to continue", thus the Hong Kong police "could not go back on the promise or the practice so as to defeat the claimant's expectation."

Thus in the present case in the case of defendants no.1 to no.5 there has been neither any such promise, nor any such practice by the Malaysian Police unlike by the Hong Kong Police in *Li Wing Tat.*

And as was cautioned in *Berthelsen*, "the two situations are poles apart, and the suggestion of the relevance of *Andrew* to the matter before us only serves to illustrate the inherent perils blind reference to authority enshrouds when resorted to without proper application of the vital considerations involved in the decision in question. The principles in *Durayappah* which we have adverted to make the position plain."

The two situations, *Berthelsen* and *Li Wing Tat* on the one hand and the present case in the case of defendants no.1 to no. 5 on the other hand are "two situations poles apart" with in the present case in the case of defendants no.1 to no. 5. Defendants no. 1 to no. 5 had not acquired or been conferred with a status or been put into a position as in *Berthelsen* and *Li Wing Tat* as to qualify defendants no. 1 to no. 5 to lay claim to "legitimate expectation."

Thus in the present case in the case of defendants no.1 to no.5 there is no wrong to undo as in *Berthelsen* and as the Hong Kong Supreme Court had to undo in *Li Wing Tat.*

Defendants' no.1 to no.5's application is dismissed with costs.

Therefore in law there is no obstacle for the present five summons cases against defendants no.1 to no.5 to be continued in the normal manner in the Magistrates' Court.